(2)

Supreme Court, U.S.
FILED

AUG 28 2003

OFFICE OF THE CLERK

No. 03-7

In The

SUPREME COURT OF THE UNITED STATES

MICHAEL A. NEWDOW,
Petitioner,

vs.

THE CONGRESS OF THE UNITED STATES, ET Al.
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE SCHOOL DISTRICT RESPONDENTS IN OPPOSITION

Terence J. Cassidy*
Michael W. Pott
PORTER SCOTT WEIBERG & DELEHANT
350 University Avenue, #200
Sacramento, CA 95825
(916) 929-1481

**Counsel of Record*

15 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Pledge of Allegiance codified in 1954 with the phrase "under God" included therein violates the Establishment Clause of the First Amendment to the United States Constitution?

2. Whether Petitioner can challenge lower court decisions regarding standing when it was held by the lower court that he does in fact have standing?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

A. History of the Pledge of Allegiance 2

B. The California Statute and Elk Grove Unified School District Policy 4

C. The Court Proceedings to Date 4

DISCUSSION 7

A. The Merits of the Matter 7

B. Standing 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

County of Allegheny v. ACLU
492 U.S. 573, 602-03 (1989) 6
Electrical Fittings Corp. v. Thomas & Betts Co.
307 U.S. 241, 242 (1939) 9
Elk Grove Unified School District et al v. Newdow
Case No. 02-1624 ..... 1, 10
Lee v. Weisman
505 U.S. 577 (1992) 5, 6, 7, 9
Lemon v. Kurtzman
403 U.S. 602 (1971) 5, 6, 7
Lynch v. Donnelly
465 U.S. 668, 687-88 (1984) 5
Marsh v. Chambers
463 U.S. 783, 792 (1983) 9
Newdow v. United States Congress
292 F.3d 597 1
Newdow v. United States Congress
313 F.3d 500 1
Newdow v. United States Congress
321 F.3d 772 1
Newdow v. United States Congress
328 F.3d 466 1
Newdow v. Congress of the United States
2000 U.S. Dist. LEXIS 22366 1
Newdow v. Congress of the United States
2000 U.S. Dist. LEXIS 22367 1
Sheldon v. Fannin
221 F.Supp. 766, 774 (D. AZ 1963) 8

Sherman v. Cmty Consol. Sch. Dist. 21
980 F.2d 437, 448 (1992),
cert denied, 508 U.S. 950 (1993) 6, 7, 8
Smith v. Denny
280 F.Supp. 651, 653-54 8

STATUTES

4 U.S.C. Section 4 7
28 U.S.C. Section 1254(1) 2
Act of June 14, 1954, ch. 297, section 7, 68 Stat. 249 2
Act of June 22, 1942, ch. 435, section 7, 56 Stat. 380 2
California Education Code Section 52720 4
Federal Rules of Civil Procedure, Rule 12(b)(6) 4

OTHER

H.R. Rep. No. 1693, 83d Cong. 2d, *see* 2,3,4 (1954) 2,3

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 2003, is reported at Newdow v. United States Congress, 328 F.3d 466. 02-1624 Pet. App. 1-24.[1] The original version of the opinion, filed on June 26, 2002, is reported at Newdow v. United States Congress, 292 F.3d 597. Pet. App. 25-56. The order of the Ninth Circuit denying rehearing and rehearing *en banc*, filed February 28, 2003, is reported at Newdow v. United States Congress, 321 F.3d 772. Pet. App. 57-86. The Ninth Circuit's decision regarding Petitioner's standing to bring suit is reported at Newdow v. United States Congress, 313 F.3d 500. Pet. App. 87-96.

The memorandum order of the United States District Court for the Eastern District of California of July 21, 2000, granting Petitioners' Motion to Dismiss, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22366. Pet. App. 97. The memorandum findings and recommendation of United States Magistrate Judge Peter A. Nowinski for the United States District Court for the Eastern District of California of May 25, 2000, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22367. Pet. App. 98-99.

JURISDICTION

The Ninth Circuit Court of Appeals entered its original judgment on June 26, 2002, and issued an amended opinion on February 28, 2003. Petitioner Newdow requested an extension of

---

[1] Citations are to the appendix to the petition for a writ of certiorari filed by the Elk Grove Unified School District and David W. Gordon in Case No. 02-1624, Elk Grove Unified School District, et al v. Michael A. Newdow, because the instant petition does not include an appendix.

the time in which he had to file a petition for writ of certiorari and that request was granted on May 20, 2003 by Justice O'Connor. Petitioner was given until June 27, 2003, in which to file his Petition and he did so on that date.[2] The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

A. History of the Pledge of Allegiance

In 1942, the Pledge of Allegiance ("Pledge") was codified to read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, section 7, 56 Stat. 380. In 1954 Congress amended the Pledge to include the words "under God." Act of June 14, 1954, ch. 297, section 7, 68 Stat. 249.

In amending the Pledge, it was noted that the reason for adopting the amendment was to acknowledge the role of God in the history of our country. The House Report reveals:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. H.R. Rep. No. 1693, 83d Cong. 2d,

---

[2] Respondents Elk Grove Unified School District and David W. Gordon sought an extension of time in which to file an opposition to Newdow's Petition and on July 30, 2003, received an extension until August 29, 2003, in which to file an opposition brief.

see 2 (1954).

The House Report further discussed references to God in the Declaration of Independence, the inscription of "In God We Trust" on coins, and references to God in the Gettysburg Address. Id. It was even noted that Representative Louis C. Rabaut, in testifying at the subcommittee hearing, "aptly" stated the need for the legislation as follows:

> By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. Id. at 3.

He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." Id.

In writing the amendment to the Pledge, the Legislative Reference Service of the Library of Congress to the Assistant Counsel of the House Committee on the Judiciary was asked to provide an opinion regarding the proper placement of the phrase "under God." Specifically, it was asked to review the following placements so as to determine which would be consistent with the legislative intent: (1) ". . . Republic for which it stands, one Nation, under God . . ."; (2) ". . . Republic for which it stands, one Nation under God . . ."; or (3) ". . . Republic for which it stands, one Nation indivisible under God . . . ." Id. at 4. By considering the legislative intent, the Legislative Reference Service concluded that the phrase "under God" was a modifier to the phrase "one Nation" because the addition was intended to affirm that the United States was founded on a fundamental belief in God. Id. Thus the placement of the phrase indicates an intent to recognize a historical fact, not an intent to establish a religion or turn the

Pledge into a religious prayer.

B. The California Statute and Elk Grove Unified School District Policy.

A California statute requires that each public elementary school in the State "conduct appropriate patriotic exercises" at the beginning of each school day. Cal. Educ. Code Section 52720. The Pledge is recognized as satisfying this requirement. Id. To satisfy this statutory provision, the Elk Grove Unified School District enacted a policy that instructs its elementary school teachers to begin each school day by leading their students in reciting the Pledge. No child is compelled to recite the Pledge.

C. The Court Proceedings to Date

On March 8, 2000, Petitioner filed suit against Respondents and others in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief, but not damages. Respondent alleged that his minor daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's (sic) is 'one nation under God.'" Pet. App. 5.

Thereafter, Respondents and other Defendants filed a motion to dismiss Petitioner's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Magistrate Judge Nowinski held a hearing on this motion, wherein Respondents requested that he issue a ruling concerning the constitutionality of the Pledge, and that the court defer ruling on the other issues. Respondents were joined in this motion by the United States Congress, the United States, and the President of the United States. Magistrate Judge Nowinski found the Elk Grove

Unified School District's policy did not violate the First Amendment. Pet. App. 98-99. These findings and recommendations were adopted on July 21, 2000, by District Judge Milton J. Schwartz of the United States District Court for the Eastern District of California. Pet. App. 97.

On appeal, a Ninth Circuit panel found that Petitioner "has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." Pet. App. 31. Since Petitioner's daughter was enrolled in the Elk Grove Unified School District ("EGUSD") at the time the decision was rendered, the Court found that Petitioner has standing to challenge the EGUSD's Pledge recitation policy. Pet. App. 32. The panel also found that Petitioner has standing to challenge the 1954 Act as it constitutes a religious recitation policy that interferes with his right to direct the religious education of his daughter. Pet. App. 36.

With respect to the merits of Petitioner's complaint, a majority of the panel found that the 1954 Act violated the Establishment Clause. Pet. App. 48-50. In so holding, the Court evaluated the phrase "under God" utilizing three tests fashioned by this Court: (1) the Lemon test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971); (2) the endorsement test enunciated in Justice O'Connor's concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984); and the coercion test set forth in Lee v. Weisman, 505 U.S. 577 (1992). Pet. App. 36-51. The majority found that the phrase violates all three tests. Pet. App. 37-44. The majority also found that the EGUSD's policy violates the Establishment Clause. Pet. App. 48-50.

Judge Fernandez, nevertheless, dissented from the majority's decision stating, "the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be de minimis." Pet. App. 52. In so finding, Judge Fernandez correctly recognized that this Court has previously considered the Pledge in dicta and

found it to be "consistent with the proposition that government may not communicate an endorsement of religious belief." Pet. App. 53 *citing* County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989).

Judge Fernandez also recognized that the Seventh Circuit had found the Pledge to be constitutional in Sherman v. Cmty Consol. Sch. Dist. 21, 980 F.2d 437, 448 (1992), cert denied, 508 U.S. 950 (1993), wherein that court stated:

> Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so. Pet. App. 53.

Thus, while Judge Fernandez heeded this call and considered the previous statements of this Court, the majority failed to do so.

After a Petition for Rehearing and a Petition for Rehearing En Banc were filed, the majority panel amended its decision to hold only that the EGUSD's policy violated the coercion test set forth in Lee. Pet. App. 11. The majority did not consider whether the policy violates the Lemon test or the endorsement test. Pet. App. 11. Judge Fernandez again dissented from the majority's finding as to the merits of the case. Pet. App. 18-24.

DISCUSSION

A. The Merits of the Matter

Petitioner first asks this Court to grant him the full declaratory relief he sought, i.e. to find the Pledge unconstitutional and to thus return the Pledge to its pre-1954 condition. Pet. 7. In so doing, he requests this Court determine whether 4 U.S.C. Section 4 violates the Establishment Clause.

In its Petition, the EGUSD asked this Court to review the issue of whether its Pledge recitation policy violates the Establishment Clause. 02-1624 Pet. 6-19. In conjunction with this request, the EGUSD argued that in finding its policy to be unconstitutional, the majority essentially found the Pledge to be unconstitutional on the grounds that the Pledge is a profession of religious belief. 02-1624 Pet. 11-14. Therefore, to the extent Petitioner herein seeks review of the constitutionality of the Pledge, the EGUSD agrees that review is warranted by this Court, for the reasons set forth in its Petition. *See* 02-1624 Pet. 6-19.

Respondents disagree, however, with Petitioner's characterization of the Seventh Circuit's opinion in Sherman. First, Petitioner questions the Court's statement that the use of Lemon in evaluating Establishment Clause cases was in doubt at the time Sherman was decided. As Petitioner notes, the Sherman decision was rendered just five months after this Court created the coercion test in Lee. 03-7 Pet. 12. Thus, it is perfectly logical that the Sherman court would note that the Establishment Clause area of the law was in flux at that time since the coercion test had just come into being.

Moreover, Petitioner's argument regarding the Sherman court's failure to find coercion despite the then-recent holding in Lee fails to address the fact that Lee was a religious prayer case while Sherman was not. Further, as observed by Justice

O'Scannlain in his dissent from the Ninth Circuit's denial of rehearing en banc in the instant case, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." 02-1624 Pet. App. 77.

The distinction between school prayer cases and patriotic exercise cases was recognized by the United States District Court for the Eastern District of California in 1968 in the case of Smith v. Denny, 280 F.Supp. 651, 653-54, wherein the court upheld the constitutionality of the Pledge. In Smith, the court compared the patriotic exercise of the Pledge to the patriotic exercise of singing the national anthem which contains a verse that references god. The Smith court reviewed the case of Sheldon v. Fannin, 221 F.Supp. 766 (D. AZ 1963), where the court found the national anthem was not a religious exercise, but was instead a patriotic ceremony intended to inspire devotion and love of the country. Id. at 774. "Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation." Id. On that basis, the Smith court found the reference to god in the Pledge also relates to a historical fact and thus held that a California statute regarding patriotic exercises in secondary schools, wherein the Pledge was noted to be an acceptable exercise, did not violate the Establishment Clause.

The insight of the Sherman and Smith cases remains intact. Recitation of the Pledge is much different than the school prayer cases decided by this and other Courts. Therefore, Petitioner's reliance on the school prayer cases as an analytical framework for evaluating this case is questionable -- especially in light of this Court's repeated statements that the Pledge does not violate the establishment clause. 02-1654 Pet. 8-9.

If the Court is inclined to utilize a specific framework to analyze the constitutionality of the Pledge, Respondent submits the

flexible approach set forth in Marsh v. Chambers, 463 U.S. 783, 792 (1983), is appropriate. In Marsh, this Court affirmed the constitutionality of legislative prayer based on the historical acceptance of the practice which had become "part of the fabric of our society." Id. Here, as in Marsh, Petitioner should not be permitted to challenge the historically accepted practice of reciting the Pledge as currently codified.

Whether one utilizes the flexible approach set forth in Marsh or examines the prior statements of this Court regarding the constitutionality of the Pledge, it is clear that Petitioner's reliance on Lee is misplaced. For each of these reasons, Respondents respectfully submit that summary reversal of the Ninth Circuit Majority's decision in this case is warranted and appropriate.

B. Standing

As for Petitioner's request that this Court review whether he has standing in any number of different ways to bring the instant suit, Respondents submit that Petitioner is unable to seek review of the question since it was decided in his favor by the Ninth Circuit. *See* Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939) ("[a] party may not appeal from a judgment or decree in his favor"). Thus, even if this Court finds Petitioner does not have standing to bring the instant claim because, as a noncustodial parent, he does not have the right to direct the religious education of his daughter, then the matter should be remanded to the Ninth Circuit to determine whether he has standing in some other capacity.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for review to determine that he has standing to bring the instant lawsuit for

reasons other than those found by the Ninth Circuit should be denied as the issue is not properly before this Court. To the extent Petitioner's request for review of the constitutionality of the 1954 Act mimics the request of Respondents in their Petition, Elk Grove Unified School District et al v. Newdow, Case No. 02-1624, Respondents respectfully submit that review of this Petition should be held until this Court has decided the EGUSD's Petition. Once a decision has been rendered regarding the EGUSD's Petition, then the Court should address the instant Petition in conformance with its decision regarding the EGUSD's Petition.

Dated: August 28, 2003

Respectfully submitted,

Terence J. Cassidy
Michael W. Pott
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, #200
Sacramento, CA 95825
(916) 929-1481